

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

OSCAR ART STANLEY,

Petitioner,

vs.

GLEN WHORTON, *et al.*,

Respondents.

3:06-cv-00126-LRH-VPC

ORDER

This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, by Oscar Stanley, a Nevada prisoner. The action comes before the court with respect to its merits. The Court will deny the petition.

I. Facts and Procedural Background

An amended criminal complaint was filed against the petitioner in the Justice Court of Las Vegas Township on December 13, 2001, charging the petitioner with robbery (count I), larceny from the person (count II), grand larceny auto (count III), burglary (count IV), attempted murder with the use of a deadly weapon (count V), battery with a deadly weapon with substantial bodily harm (count VI), mayhem (count VII), burglary (count VIII), robbery (count IX), attempted robbery (count X), and attempted grand larceny auto (count XI). Exhibit 3.¹ A preliminary hearing was held on December 18, 2001. Exhibit 4. At the hearing, the state gave oral notice of its intent to seek a large violent habitual criminal enhancement. *Id.* The justice court found sufficient evidence to support

¹ The exhibits cited in this order in the form "Exhibit __," are those filed by respondents in support of their answer to the habeas petition and are located in the record at docket #17-22.

1 the amended complaint. *Id.* Petitioner entered a not guilty plea on January 3, 2002. Exhibit 6. An
2 information was filed in the District Court for Clark County on December 31, 2001, charging the
3 petitioner with the same crimes but adding in count X, attempted robbery of a victim sixty-five years
4 of age or older. Exhibit 5.

5 Counsel for petitioner then moved to strike the duplicitous counts and to suppress the
6 petitioner's confession. Exhibits 13 and 14. The trial court denied these motions at a March 1, 2002
7 hearing. Exhibit 17. A jury trial was held between March 4, 2002, and March 12, 2002. Exhibits
8 18-26. The jury convicted petitioner as charged of counts I, II, VI, VII, IX, and X. Exhibit 28. The
9 jury also convicted petitioner of two counts of unlawful taking of a vehicle without the consent of the
10 owner, lesser included offenses of counts III and XI. *Id.* Petitioner was acquitted on counts IV, V,
11 and VII, the burglary counts and the attempted murder count. *Id.*

12 Defense counsel then moved to dismiss counts III and XI, arguing those counts merged into
13 counts I and X. Exhibit 29. Counsel also moved to strike "the victim sixty-five years of age or
14 older" language from count X. Exhibit 30. The state district court dismissed counts III and XI.
15 Exhibit 32. The court then sentenced the petitioner to life without the possibility of parole for counts
16 I and IX, as a habitual felon, to 48 months imprisonment with parole eligibility in 12 months for
17 count II, to 180 months in prison with parole eligibility after 72 months for count VI, and to 120
18 months in prison with parole eligibility in 48 months for both counts VII and X. *Id.* The sentences
19 are to be served consecutively. *Id.* A judgment of conviction was entered on June 4, 2002. Exhibit
20 33.

21 Petitioner appealed, arguing (1) his rights to due process and a fair trial were violated when
22 the trial court denied his motion to suppress his statement and when the court responded incorrectly
23 to a jury question, (2) his rights to due process and a fair trial were violated when the court denied
24 defense counsel's request to ask the jury its pre-submitted voir dire questions, when the court
25 permitted the state to use a peremptory challenge in violation of *Batson*, and when the trial court
26 dismissed a black juror who arrived fifteen minutes late on the day of jury selection, and (3) his right
27 to be protected from double jeopardy was violated when the court permitted the jury's verdict of
28 guilty on both battery with substantial bodily harm and mayhem, or that there was insufficient

1 evidence to support the conviction of mayhem. Exhibits 34 and 35.

2 On November 4, 2003, the Nevada Supreme Court affirmed in part and reversed in part,
3 finding that the conviction of battery with the use of a deadly weapon with substantial bodily harm
4 should be reversed, as this conviction was redundant to the mayhem conviction. Exhibit 38.
5 Remittitur issued on December 2, 2003. Exhibit 39. On January 16, 2004, the state district court
6 entered an amended judgment of conviction, striking the conviction for battery with a deadly weapon
7 with substantial bodily harm. Exhibit 40.

8 Petitioner then filed a state habeas corpus petition on April 19, 2004, alleging nine grounds
9 for relief. Exhibit 41. The state district court held an evidentiary hearing on the petition, and denied
10 the petition. Exhibits 46 and 48. Petitioner appealed, and the Nevada Supreme Court affirmed the
11 lower court's denial of the petition. Exhibit 49. Remittitur issued on January 3, 2006. Exhibit 50.

12 Petitioner mailed his federal habeas corpus petition on March 2, 2006 (docket #10).
13 Respondents have answered petitioner's claims (docket #16), petitioner has filed a traverse (docket
14 #27) and respondents have filed a reply (docket #30).

15 **II. Federal Habeas Corpus Standards**

16 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), provides the legal standard
17 for the Court's consideration of this habeas petition:

18 An application for a writ of habeas corpus on behalf of a person in
19 custody pursuant to the judgment of a State court shall not be granted
20 with respect to any claim that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim --

21 (1) resulted in a decision that was contrary to, or involved an
unreasonable application of, clearly established Federal law, as
22 determined by the Supreme Court of the United States; or

23 (2) resulted in a decision that was based on an unreasonable
determination of the facts in light of the evidence presented in the State
24 court proceeding.

25 28 U.S.C. §2254(d).

26 The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications
27 in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect
28 to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). A state court decision is

contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, ““if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases”” or ““if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court’s] precedent.”” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

A state court decision is an unreasonable application of clearly established Supreme Court precedent ““if the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.”” *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The unreasonable application clause “requires the state court decision to be more than incorrect or erroneous”; the state court’s application of clearly established law must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). *See also Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004).

In determining whether a state court decision is contrary to, or an unreasonable application of, federal law, this Court looks to a state court’s last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512 F.3d 1204, 1209-10 (9th Cir. 2008) (en banc).

Moreover, “a determination of a factual issue made by a State court shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

III. Discussion

A. Ground One

In his first ground for relief petitioner alleges that his Fifth and Fourteenth Amendment rights were violated when the state improperly gave notice of its intent to seek habitual felon adjudication, pursuant to NRS 207.012, following the preliminary hearing. Petitioner also contends that the state was estopped from imposing or seeking habitual felon adjudication once he was acquitted of the charge of attempted murder. Petitioner states that due to ineffective assistance of trial counsel and appellate counsel this issue was not raised at trial and sentencing or on appeal.

At the end of the preliminary hearing held on December 18, 2001, the state gave the

petitioner and his attorney oral notice of its intent to seek habitual felon adjudication. Exhibit 4, T 66. The state noted that the petitioner had a prior 1981 robbery conviction from Illinois, and a 1994 armed robbery conviction from Illinois. *Id.* Defense counsel objected. *Id.* The state explained that it was just putting the defense on notice that they intended to seek habitual criminal status. *Id.* The amended information contained the following language:

Defendant Oscar A. Stanley...is placed on notice that, in accordance with the authorization of NRS 207.012, punishment imposed pursuant to the above-stated violent habitual criminal statute will be urged upon the Court if said Defendant is found guilty on the primary offenses of Robbery and Attempt Murder With Use of a Deadly Weapon, for which the Defendant is presently charged.

Exhibit 11. Petitioner was convicted of the two robbery counts he was charged with, was acquitted of the attempted murder charge, and was sentenced as a habitual felon. Exhibit 33.

Petitioner argued at the evidentiary hearing in the state court the oral notice of the state's intent to seek habitual felon status was improper, and the state could not sentence him as a habitual criminal as he was acquitted of the attempted murder charge. Exhibit 46. Petitioner's contention is essentially that the language in the information of the state's intent to seek habitual felon status was a condition precedent or a contractual agreement, as the notice stated that if petitioner is found guilty of robbery and attempted murder then punishment would be imposed according to the violent habitual offender statute.

Respondents argue that this claim was procedurally defaulted in the state court.

1. Procedural Default

Generally, in order for a federal court to review a habeas corpus claim, the claim must be both exhausted and not procedurally barred. *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003). Procedural default refers to the situation where a petitioner in fact presented a claim to the state courts but the state courts disposed of the claim on procedural grounds rather than denying the claim on the merits. A federal court will not review a claim for habeas corpus relief if the decision of the state court regarding that claim rested on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). The *Coleman* Court stated the effect of a procedural default as follows:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural default doctrine ensures that the state's interest in correcting its own mistakes is respected in all federal habeas cases. *See Koerner*, 328 F.3d at 1046.

2. Procedural Default in the State Court

Respondents argues that this ground for relief was procedurally defaulted in the state court. On appeal, the Nevada Supreme Court addressed petitioner's claim that trial counsel was ineffective for failing to object to the inadequate notice of the state's intent to seek habitual felon adjudication. Exhibit 49. The court also denied petitioner's claim that appellate counsel was ineffective for failing to raise errors in his adjudication as a habitual felon on the merits. *Id.* However, the court also stated that to the extent the petitioner raised any of his issues "independently from his ineffective assistance of counsel claims" that the court found those claims waived as they should have been raised on direct appeal. *Id.* at 2, n.2 (citing NRS 34.810(1)(b)). The court found that petitioner had not demonstrated good cause for his failure to raise any such claims on appeal. *Id.*

The instant claim does not contend that trial counsel or appellate counsel was ineffective, and instead argues that the habitual felon adjudication is illegal or improper due to the state's improper oral notice and the state's failure to abide by the condition precedent or agreement made in the notice given in the amended information. It appears that this claim was procedurally defaulted in the state court.

To the extent that it can be argued that the Nevada Supreme Court's decision was silent on this claim, as it did not specifically address this claim, then this Court would look to the last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512 F.3d 1204, 1209-10 (9th Cir. 2008) (en banc). The state district court also denied this claim, stating that the petitioner failed to show good cause why he did not present his due process violation claims on direct appeal. Exhibit 48. The state district court found the claim was waived. *Id.*

Therefore, it appears that this claim was procedurally defaulted in the state court, as both the state district court and the Nevada Supreme Court found the claim was waived as it should have been raised on direct appeal.

3. The Procedural Default Was an Independent and Adequate State Law Ground for the Nevada Supreme Court's Disposition of Petitioner's Claims

For the procedural default doctrine to apply, "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994). *See also Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996).

NRS 34.810 has been held to be an independent and adequate state procedural rule that will bar federal review. *See Vang v. Nevada*, 329 F.3d 1069, 1074-75 (9th Cir. 2003); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999). This court finds that the Nevada Supreme Court's and the state district court's determination that ground one was procedurally barred under NRS 34.810 was an independent and adequate ground for the court's denial of the state habeas petition.

4. Cause and Prejudice or Fundamental Miscarriage of Justice

To overcome a procedural default, a petitioner must establish either (1) "cause for the default and prejudice attributable thereto," or (2) "that failure to consider [his defaulted] claim[s] will result in a fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262 (1989) (citations omitted). Cause to excuse a procedural default exists if a petitioner can demonstrate that some objective factor external to the defense impeded the petitioner's efforts to comply with the state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991); *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The prejudice that is required as part of the showing of cause and prejudice to overcome a procedural default is "actual harm resulting from the alleged error." *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998); *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984).

Petitioner argues, in his traverse, that trial counsel and appellate counsel were ineffective for failing to raise this claim on appeal. Ineffective assistance of counsel may satisfy the cause requirement to overcome procedural default only if the independent claim of ineffective assistance of counsel itself has been exhausted in state court. *Murray*, 477 U.S. at 488-89.

Petitioner has exhausted the individual claims of ineffective assistance of trial counsel and appellate counsel in the state courts. Exhibits 41 and 49. Therefore petitioner can rely on these claims to support his allegation of cause in an attempt to overcome the state procedural bar. However, to establish prejudice based on the deficient assistance of appellate counsel, petitioner must show that the omitted issue would have a reasonable probability of success on appeal. *Smith v. Robbins*, 52 U.S. 259, 285 (2000); *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002).

Petitioner has not shown that the omitted claims had a reasonable probability of success on the merits, as there is not a reasonable probability that had these claims been raised on direct appeal that the outcome of the appeal would have been different.

Nevada Revised Statute 207.012 states:

1. A person who:

(a) Has been convicted in this State of a felony listed in subsection 2; and

(b) Before the commission of that felony, was twice convicted of any crime which under the laws of the situs of the crime or of this State would be a felony listed in subsection 2, whether the prior convictions occurred in this State or elsewhere,

is a habitual felon and shall be punished for a category A felony by imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

2. The district attorney shall include a count under this section in any information...if each prior conviction and the alleged offense committed by the accused constitutes a violation [of this section.]

3. The trial judge may not dismiss a count under this section that is included in an indictment or information.

Pursuant to the statute, the trial court must sentence a petitioner to one of the listed terms of imprisonment if the petitioner was convicted of an enumerated felony, and has two prior enumerated felonies. Petitioner was convicted of two counts of robbery, which is a felony listed in subsection 2 of the statute. NRS 200.380; NRS 207.012 2. Furthermore, the state listed petitioner's two prior

1 felonies as robbery and armed robbery, which also satisfy the statute. *Id.*

2 There is no indication that the notice the state gave was improper. In Nevada, a criminal
3 defendant is entitled to “reasonable notice” of the state’s intent to seek habitual criminal or felon
4 adjudication as a matter of constitutional due process. *See Parkerson v. State*, 678 P.2d 1155 (Nev.
5 1984) (citing *Oyler v. Boles*, 386 U.S. 448 (1962)). Even if the oral notice was somehow improper,
6 which it does not appear to be, the notice given in the amended information was proper. The state is
7 not required to prove the prior convictions at the time of the notice; the state only need to prove the
8 prior convictions at the time of sentencing. Furthermore, although the notice stated that if the
9 petitioner was convicted of robbery and attempted murder that a habitual criminal sentence would be
10 sought, this was not a binding contractual agreement or condition precedent. The state merely listed
11 in its notice that the petitioner was eligible for violent habitual criminal sentences for both the
12 robbery charges and the attempted murder charge. Petitioner’s conviction of two counts of robbery
13 was sufficient for a habitual criminal sentence under NRS 207.012.

14 Petitioner has not met the standard for a showing of ineffective assistance of trial counsel or
15 appellate counsel as cause for procedural default. This claim will be dismissed as it has been
16 procedurally defaulted.

17 **B. Ground Two**

18 In his second ground for relief the petitioner contends that his Fifth, Sixth, and Fourteenth
19 Amendment rights to effective assistance of counsel and due process of law were violated when trial
20 counsel failed to challenge the habitual criminal notice and the subsequent adjudication as a habitual
21 criminal.

22 In order to prove ineffective assistance of counsel, petitioner must show (1) that counsel
23 acted deficiently, in that his attorney made errors so serious that his actions were outside the scope of
24 professionally competent assistance and (2) the deficient performance prejudiced the outcome of the
25 proceeding. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984).

26 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
27 performance of counsel resulting in prejudice, “with performance being measured against an
28 ‘objective standard of reasonableness,’ . . . ‘under prevailing professional norms.’” *Rompilla v.*

1 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
2 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary
3 to, or an unreasonable application of the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1,
4 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of
5 reasonable professional assistance. *Id.*

6 The Nevada Supreme Court, in affirming the district court's denial of petitioner's second
7 claim for relief, stated:

8 First, appellant claimed that his counsel was ineffective for failing to object
9 to inadequate notice of a possible habitual criminal adjudication. Specifically,
10 appellant argued that the State should not have been allowed to seek a habitual
11 criminal sentence since he was acquitted of the charge of attempted murder, and the
12 State had specified verbally that it would only seek habitual criminal sentencing if
13 appellant was convicted of robbery and attempted murder. Appellant has failed to
14 demonstrate that counsel's performance was ineffective. Appellant was found
15 guilty of two counts of robbery, which was sufficient to adjudicate appellant a
16 habitual felon pursuant to NRS 207.012(2). Appellant was specifically noticed of
17 the State's intent to seek habitual felon adjudication during his preliminary hearing
18 and per amended information on February 5, 2002. The district court, in its
19 discretion, adjudicated appellant a habitual felon. Therefore, appellant failed to
20 demonstrate that counsel's performance was deficient, and the district court did not
21 err in denying this claim.

22 Exhibit 49.

23 The Nevada Supreme Court's determination was not an objectively unreasonable application
24 of *Strickland*. As was discussed in relation to ground one, the state's notice of intent to seek habitual
25 criminal adjudication was sufficient, as petitioner is only entitled to reasonable notice. *Parkerson*,
26 678 P.2d at 1156. The state gave the petitioner both oral and written notice. Moreover, the notice
27 did not create some type of condition precedent, i.e., that petitioner had to be convicted of both
28 attempted murder and robbery. Under NRS 207.012, petitioner can be sentenced as a violent
habitual criminal (habitual felon) if he was convicted of one of the enumerated felonies, and has two
prior felony convictions. Petitioner was convicted of two counts of robbery, and had two prior
felony convictions that qualified under the statute. Although petitioner was acquitted of the
attempted murder charge, he still qualified to be adjudicated as a violent habitual criminal by virtue
of being convicted of the robbery counts.

Petitioner has not shown that trial counsel was ineffective for failing to challenge the state's

1 notice of intent to seek violent habitual criminal adjudication or the trial court's adjudication of the
2 petitioner as a habitual criminal even though he was acquitted of the attempted murder charge. The
3 Court will deny ground two.

4 **C. Ground Three**

5 In ground three the petitioner alleges that his Fifth and Fourteenth Amendment rights to due
6 process were violated when the state failed to present two certified judgments of convictions and
7 instead only presented one certified copy of a judgment of conviction. Two certified copies of prior
8 convictions are required in order to adjudicate a criminal defendant as a habitual criminal. *See* NRS
9 207.016 (5) (stating for the "purposes of NRS 207.010, 207.012 and 207.014, a certified copy of a
10 felony conviction is prima facie evidence of conviction of a prior felony").

11 Respondents argue that this claim was also procedurally defaulted in the state court.

12 **1. Procedural Default in the State Court**

13 On appeal, the Nevada Supreme Court addressed the claim that counsel was ineffective for
14 failing to object to the state's failure to present two certified copies of judgments of convictions at
15 sentencing, as is required for habitual felon sentencing. Exhibit 49. The court also stated that to the
16 extent the petitioner raised this issue "independently from his ineffective assistance of counsel
17 claims" that the court found those claims waived as they should have been raised on direct appeal.
18 *Id.* at 2, n. 2 (citing NRS 34.810(1)(b)). The court also found that petitioner had not demonstrated
19 good cause for his failure to raise any such claims on appeal. *Id.*

20 The instant claim does not contend that trial counsel or appellate counsel was ineffective for
21 failing to challenge the state's failure to provide two certified copies of judgments of convictions. It
22 appears that this claim was procedurally defaulted in the state court.

23 To the extent that it can be argued that the Nevada Supreme Court's decision was silent on
24 this claim, as it did not specifically address this claim, then this Court would look to the last
25 reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512
26 F.3d 1204, 1209-10 (9th Cir. 2008) (en banc). The state district court also denied this claim, stating
27 that the petitioner failed to show good cause why he did not present his due process violation claims
28 on direct appeal. Exhibit 48. The state district court found the claim was waived. *Id.*

Therefore, it appears that this claim was procedurally defaulted in the state court, as both the state district court and the Nevada Supreme Court found the claim was waived as it should have been raised on direct appeal.

2. The Procedural Default Was an Independent and Adequate State Law Ground for the Nevada Supreme Court's Disposition of Petitioner's Claims

For the procedural default doctrine to apply, "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994). *See also Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996).

NRS 34.810 has been held to be an independent and adequate state procedural rule that will bar federal review. *See Vang v. Nevada*, 329 F.3d 1069, 1074-75 (9th Cir. 2003); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999). This court finds that the Nevada Supreme Court's and the state district court's determination that ground one was procedurally barred under NRS 34.810 was an independent and adequate ground for the court's denial of the state habeas petition.

4. Cause and Prejudice or Fundamental Miscarriage of Justice

To overcome a procedural default, a petitioner must establish either (1) "cause for the default and prejudice attributable thereto," or (2) "that failure to consider [his defaulted] claim[s] will result in a fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262 (1989) (citations omitted). Cause to excuse a procedural default exists if a petitioner can demonstrate that some objective factor external to the defense impeded the petitioner's efforts to comply with the state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991); *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The prejudice that is required as part of the showing of cause and prejudice to overcome a procedural default is "actual harm resulting from the alleged error." *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998); *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984).

Petitioner does not state any arguments relating to cause and prejudice, therefore the Court will dismiss ground three, as it was procedurally defaulted.

To the extent it could be argued that petitioner claims that trial counsel was ineffective for failing to argue this claim on appeal, petitioner may have shown cause and prejudice. Ineffective

1 assistance of counsel may satisfy the cause requirement to overcome procedural default only if the
2 independent claim of ineffective assistance of counsel itself has been exhausted in state court.
3 *Murray*, 477 U.S. at 488-89.

4 Petitioner has exhausted the individual claim of ineffective assistance of trial counsel in the
5 state courts. Exhibits 41 and 49. Therefore petitioner can rely on this claim to support his allegation
6 of cause in an attempt to overcome the state procedural bar. However, petitioner has not shown that
7 trial counsel was ineffective for failing to challenge the state's failure to present two certified copies
8 of judgments of convictions.

9 The state district court addressed this claim at the evidentiary hearing. Exhibit 46. Trial
10 counsel testified that she did not object to the prior convictions because she received two certified
11 and stamped judgments of convictions. *Id.* at 16. Counsel noted that they were self-authenticating.
12 *Id.* Petitioner seemed to be arguing that one document was a "judgement of conviction" while the
13 other was a commitment order to the department of corrections and therefore did not count as a prior
14 conviction because it was not a "judgment of conviction." *Id.* at 17-18. The trial court rejected this
15 argument. *Id.* ; Exhibit 48.

16 On appeal the Nevada Supreme Court affirmed the denial of this claim, stating that the claim
17 was belied by the record. Exhibit 49. The court noted that during sentencing the state presented
18 certified copies of both prior convictions. *Id.* The Nevada Supreme Court's determination that this
19 claim was without merit is not objectively unreasonable. A state court's factual determination may
20 not be overturned unless this court cannot "reasonably conclude that the finding is supported by the
21 record. *Cook v. Schriro*, 516 U.S. 802, 816 (9th Cir. 2008); *Miller-El v. Cockrell*, 537 U.S. 32
22 (2003) (stating "[f]actual determinations by state courts are presumed correct absent clear and
23 convincing evidence to the contrary" and a decision made by a state court based upon a factual
24 determination "will not be overturned...unless objectively unreasonable in light of the evidence
25 presented in the state-court proceeding").

26 The documents presented at sentencing included a 1981 certified statement of
27 conviction/disposition for robbery. Exhibit 41. The other document was a certified statement of
28 conviction/disposition for armed robbery in 1994. *Id.* The 1994 conviction also showed a

1 commitment order. *Id.* Both convictions noted that the petitioner was represented by counsel. *Id.*
2 There is no indication that counsel should have objected to the 1994 conviction.

3 Petitioner has not met the standard for a showing of ineffective assistance of trial counsel as
4 cause for procedural default. This claim will be dismissed as it has been procedurally defaulted.

5 **D. Ground Four**

6 In ground four the petitioner alleges that trial counsel was ineffective when counsel failed to
7 investigate the prior convictions and did not contest the state's offer of proof at sentencing. This
8 claim was discussed above, in conjunction with ground three, and this Court concluded that there
9 was no indication that trial counsel was deficient for failing to investigate or object to the judgments
10 of convictions that the state offered at sentencing.

11 The Court will deny ground four.

12 **E. Ground Five**

13 In ground five petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights to
14 effective assistance of counsel and due process were violated when trial counsel failed to present a
15 defense to the crimes charged. Petitioner asserts that there was existing evidence that he had a
16 mental illness, organic brain damage, and an I.Q. verging on mental retardation, yet counsel did not
17 investigate this defense or contact witnesses.

18 Petitioner's claim is belied by the record. At the evidentiary hearing trial counsel testified
19 that she received documents relating to petitioner's mental illness, mental health, and mental
20 retardation. Exhibit 46, T 26. Furthermore, counsel stated that Dr. Paglini examined petitioner. *Id.*
21 Counsel determined that she could not put forth a defense based upon petitioner's mental health
22 because they could not show that the petitioner lacked the capacity to form intent for the crimes. *Id.*
23 Moreover, counsel noted that Dr. Paglini, a mental health expert, would not have testified in the
24 petitioner's favor. *Id.* at T 27. Petitioner was also evaluated for competency by two different
25 psychologists. *Id.* at T 31. Both psychologists stated that the petitioner was competent. *Id.*

26 The state noted that the petitioner was only convicted of the general intent crimes that he was
27 charged with, and not the specific intent crimes. *Id.* at T 33. The state district court ruled that trial
28 counsel did explore a mental health defense or some type of diminished capacity defense. *Id.* at 33.

1 However, the results of the investigation would not support the theory of defense, therefore counsel
2 did not call these witnesses at trial. *Id.* The court also stated that defense counsel made a tactical
3 decision to not enter the expert witness's report at trial, as it did not support the defense theory. *Id.*

4 The court also addressed petitioner's claim that counsel failed to interview witnesses. *Id.* at
5 T 45. Petitioner stated that counsel failed to interview other witnesses about his mental health
6 history. *Id.* Defense counsel testified that she attempted to contact every hospital and mental health
7 facility, and some of the witnesses could not be contacted. *Id.* Defense counsel was able to contact
8 some of the facilities, and received documents from them, but concluded that none of the documents
9 or potential witnesses would be of assistance at trial. *Id.* at 46. The court concluded that the
10 evidence counsel did find after investigating showed that there was not a mental health defense. *Id.*
11 at 51.

12 The Nevada Supreme Court affirmed the lower court's denial of this claim, stating:

13 Third, appellant claimed that counsel was ineffective for failing to
14 investigate, prepare and present a defense to the charges. Specifically,
15 appellant claimed that counsel did not present any witnesses. Appellant
16 failed to demonstrate that his counsel's performance was deficient or that
17 he was prejudiced and the outcome would have been different with further
18 investigation and presentation of witnesses. Counsel stated during the trial
19 that she had tried to contact five witnesses supplied by appellant. Of those
20 that could be contacted, counsel testified at the evidentiary hearing that she
21 made a tactical decision not to present the witnesses because they would
22 not have been beneficial to appellant's case. Appellant failed to state how
23 any of these witnesses would have aided his defense. Counsel did present
24 a defense; however, options were limited because of the strength of the
25 State's case. Appellant failed to demonstrate that counsel's performance
26 was ineffective, and we conclude that the district court did not err in
27 denying this claim.

21 Fourth, appellant claimed that counsel was ineffective for failing to
22 present appellant's defense theory that his criminal behavior was excusable
23 because he had a mental illness and was a drug addict. Specifically,
24 appellant argued that counsel withdrew the originally noticed mental health
25 expert witness and failed to contact mental health professionals from
26 appellant's past. Appellant failed to demonstrate that his trial counsel's
27 performance was deficient or that he was prejudiced. This court has
28 rejected the doctrine of partial responsibility or diminished capacity. [fn 8:
Ogden v. State, 96 Nev. 258, 262, 607 P.2d 576, 578 (1980); *see also Fox*
v. State, 73 Nev. 241, 244-5, 316 P.2d 924, 926 (1957).] Appellant was
correct that one mental health expert witness was originally notice;
however, the expert's testimony was withdrawn because, after examining
appellant, he stated that he could not testify in support of a mental health
defense. Counsel testified during the evidentiary hearing that if she had
put the expert on the stand, she felt it was probably that the jury would have

1 determined that appellant was capable of forming intent. Even
2 withstanding the fact that no mental health expert testified, counsel was
3 able to convince the jury that appellant was not guilty on all of the specific
4 intent crimes. The report that the expert wrote, and one from a past medical
5 health provider, were supplied to the court prior to sentencing. Thus,
6 appellant failed to demonstrate that counsel's performance was ineffective
7 or that he was prejudiced by the lack of testimony by the mental health
8 expert. Accordingly, the district court did not err in denying this claim.

9 Exhibit 49.

10 Petitioner has not shown that the Nevada Supreme Court's determination was objectively
11 unreasonable. Counsel testified at the evidentiary hearing that she investigated a mental health
12 defense. Counsel contacted witnesses, received documents, and had the petitioner psychologically
13 evaluated by three doctors. The witnesses and documents did not support a mental health defense.
14 There is no indication that trial counsel performed deficiently under *Strickland*.

15 Furthermore, the United States Supreme Court has noted that "strategic choices made after
16 thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."
17 *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). "Whether counsel's actions constituted a
18 'tactical' decision is a question of fact, and...[a court] must decide whether the state court made an
19 unreasonable determination of the facts in light of the evidence before it." *Pinholster v. Ayers*, 525
20 F.3d 742 (9th Cir. 2008) (citing *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en
21 banc); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004)). There is no indication that the
22 state court unreasonably determined that counsel's decision was tactical, in light of the evidence at
23 the evidentiary hearing.

24 The Court will deny ground five.

25 **F. Ground Six**

26 In his sixth claim petitioner alleges his Fifth, Sixth, and Fourteenth Amendment rights to
27 effective assistance of counsel, a fair trial, and due process of law were violated when trial counsel
28 failed to give an opening statement and conceded petitioner's guilt.

At the evidentiary hearing defense counsel testified that Mr. Avants, petitioner's other
counsel at trial, did make a brief opening statement. Exhibit 46 at T 54. Defense counsel stated that
Mr. Avants did what they thought was necessary for an opening statement, in that he told the jury to

1 be open minded and listen carefully to what was said. *Id.* The state noted that opening statements
 2 are not evidence to be considered by the jury. *Id.* at 55. The Nevada Supreme Court affirmed the
 3 denial of this claim, stating that the claim was belied by the record. Exhibit 49. The court noted that
 4 counsel did give an opening statement, albeit brief. *Id.* The court also stated that petitioner failed to
 5 specify what counsel should have additionally included in the opening statement, such that there
 6 would be a reasonable probability of a different outcome. *Id.*

7 Moreover, the Nevada Supreme Court affirmed the denial of petitioner's claim that counsel
 8 conceded his guilt. *Id.* The court stated:

9 Ninth, appellant claimed that counsel was ineffective in conceding
 10 his guilt to the jury. Appellant failed to demonstrate that counsel's
 11 performance was deficient. Counsel did not concede guilt, however, the
 12 State's case was strong. Appellant committed several different crimes
 13 within a timeframe [sic] of approximately seven hours. Two of the victims
 14 were familiar with appellant prior to the crimes. All of the victims
 15 identified appellant. Appellant dropped his wallet containing his
 16 identification at the scene of one of the crimes. Appellant left incriminating
 17 evidence at one of the scenes, on which his fingerprints had been recovered.
 18 Appellant gave a voluntary statements implicating himself in all of the
 19 crimes. Counsel gave an extensive closing argument in which she
 20 identified all of the counts and the elements that the State had to prove.
 21 The jury's verdict was consistent with counsel's argument in that they
 22 found appellant not guilty on three of the counts. Appellant failed to
 23 demonstrate that counsel's performance was deficient, and the district court
 24 did not err in denying this claim.

25 *Id.*

26 The Nevada Supreme Court's affirmance of this claim was not objectively unreasonable.
 27 Petitioner's claim is belied by the record. Defense counsel Avants did make a brief opening
 28 statement at trial. Exhibit 20, T 15-16. Petitioner did not allege what else defense counsel could
 have said during opening statements that would have changed the outcome of trial. Furthermore,
 there is no indication that defense counsel conceded petitioner's guilt at trial. Petitioner has not
 shown that trial counsel acted deficiently. The Court will deny ground six.

29 **G. Ground Seven**

30 In ground seven petitioner argues that his Fifth, Sixth, and Fourteenth Amendment rights to
 31 effective assistance of counsel, a fair trial, and due process were violated when trial counsel (a)
 32 allowed prejudicial pictures to be introduced to the jury at trial and (b) had a conflict of interest with
 33 petitioner such that effective representation was precluded.

1 **1. Counsel's Failure to Preclude Photographs at Trial**

2 Petitioner contends that Dr. Lovett testified at trial to victim Baptist's burn injuries.
3 Petitioner argues that the use of the enlarged photographic depictions of the victim's burn injuries
4 was unnecessary, prejudiced the jury and counsel improperly allowed the photographs to be entered
5 into evidence.

6 At trial Dr. Lovett testified he saw and treated victim Baptiste on October 25, 2001. Exhibit
7 20, T 20. The victim told the doctor that someone had poured gasoline on her and lit her on fire. *Id.*
8 at T 21. The state then showed the doctor four photographs of the victim that the burn unit had
9 taken. *Id.* at T 23-24. The state moved to admit the photographs into evidence, and the trial court
10 granted the motion, but stated that defense counsel "reserves the right to make a record in the
11 matter." *Id.* at T 24-25. The court also allowed the state to publish the photographs to jury by
12 showing the photographs using a projector and screen. *Id.* at 25. Dr. Lovett then testified to the
13 injuries that were depicted in each of the four photographs. *Id.* at T 25-32.

14 At the evidentiary hearing defense counsel testified that she objected to the admission of the
15 photographs prior to trial. Exhibit 46, at T 51. Counsel stated that most of the photographs were not
16 allowed to be submitted at trial. *Id.* The court stated that this was typical, that the court would not
17 allow extra photographs that show blood and gore that would excite the jury. *Id.* at 52.

18 The Nevada Supreme Court concluded that petitioner failed to show that counsel was
19 ineffective in this regard. The court stated:

20 Tenth, appellant claimed that counsel was ineffective for failing to
21 object to photo images of one of the victim's burn injuries, which
22 prejudiced the jury. Appellant failed to demonstrate that counsel's
23 performance was deficient. Several photographs were not admitted due to
24 counsel's urging, and only four were admitted. We conclude that the
25 photographs assisted the jury in understanding the nature and quality of the
26 burns inflicted due to fire and were useful to the victim's physician to
27 demonstrate the extent and permanence of the victim's injuries. [fn 11: *See*
28 *Wesley v. State*, 112 Nev. 503, 512-13, 916 P.2d 793, 800 (1996); *see also*
 Thomas v. State, 114 Nev. 1127, 1141, 967 P.2d 1111, 1121 (1998).]
 Appellant failed to demonstrate that the admission of the photographs of
 the victim's injuries prejudiced the jury as to make the jury's verdict
 unreliable. Therefore, we conclude that the district court did not err in
 denying this claim.

Exhibit 49.

Claims of error from an allegedly erroneous admission of photographs will not normally state

1 a federal claim, however, a claim of violation of due process may arise from the introduction of
2 gruesome photographs of the victim. *See Butcher v. Marquez*, 758 F.2d 373 (9th Cir. 1985);
3 *Batchelor v. Cupp*, 693 F.2d 859 (9th Cir. 1982). A federal court will not reverse a state court's
4 admission of photographs unless the admission of evidence so infects the trial with unfairness as to
5 render the verdict a denial of due process. *See Romana v. Oklahoma*, 512 U.S. 1, 12 (1994);
6 *Gerlaugh v. Stewart*, 129 F.3d 1027, 1032 (9th Cir. 1997) (citing *Estelle v. McGuire*, 502 U.S. 62,
7 67-68 (1991)). *See also Butcher*, 758 F.2d at 373; *Batchelor*, 693 F.2d at 865. Admission of
8 photographs at trial rests largely within the discretion of the trial court. 758 F.2d at 865.

9 In the instant case, this Court cannot say that the introduction of the photographs so infected
10 the trial with unfairness as to render the verdict a denial of due process. The state district court only
11 allowed four photographs depicting the victim's injuries at trial. These photographs were used by
12 Dr. Lovett to explain to the jury the extent of the victim's injuries. The Nevada Supreme Court
13 determined that these photographs did not prejudice the jury and thus make the verdict unreliable.
14 The factual findings of the state courts are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has
15 failed to meet his burden of proving that the Nevada Supreme Court's decision was contrary to, or
16 involved an unreasonable application of, clearly established federal law, as determined by the United
17 States Supreme Court, or that it was based on an unreasonable determination of the facts in light of
18 the evidence presented in the state court proceeding. The Court will deny habeas relief with respect
19 to this portion of ground seven.

20 **2. Conflict of Interest with Counsel**

21 In this portion of ground seven petitioner alleges that he was denied his rights to effective
22 assistance of counsel, a fair trial, and due process, due to a conflict of interest with counsel.
23 Petitioner states that there were hostilities on the part of defense counsel, and the complete lack of
24 preparing a defense clearly demonstrates the hostility and conflict.

25 At arraignment petitioner asked the court about how he could get a new attorney as counsel
26 told him that she would not be able to be his attorney after a duration of time. Exhibit 6, T 4.
27 Counsel told the court that she was asking for medical leave, and would be out, but represented that
28 the public defender's office was ready, willing and able to continue to represent the petitioner. *Id.* at

1 T 5. Counsel told the court that she was staying on the case until her medical leave, and that she
2 would be overseeing the case and would be available to assist. *Id.* Moreover, another attorney from
3 the public defender's office would be brought on the case. *Id.*

4 Petitioner then filed a motion to dismiss counsel and to have new counsel appointed. Exhibit
5 7. The state district court denied this motion. Exhibit 12. Petitioner filed a second motion to
6 dismiss counsel. Exhibit 15. The state district court held a hearing on March 1, 2002, to hear
7 argument on several motions, including petitioner's motion to dismiss counsel. Exhibit 17. At the
8 hearing petitioner told the court that he was considering having new counsel appointed because there
9 was a conflict of interest. *Id.* at T 19-20. Defense counsel stated that the issue was that originally
10 there were a few witnesses the state had noted it might call at trial that the public defender's office
11 had previously represented. *Id.* at T 20. The state had since determined that it was not going to call
12 those witnesses at trial. *Id.*

13 The petitioner also told the court that he had given defense counsel information about
14 witnesses to contact who could testify on his behalf. *Id.* at T 22. Petitioner argued that only one
15 witness was contacted. *Id.* Defense counsel told the court that they had contacted all of the people
16 that petitioner had asked him to. *Id.* Counsel also stated that he had received documents and copies
17 of everything were provided to the petitioner. *Id.* Counsel stated that he also advised the petitioner
18 that the attorneys had done a thorough investigation, and that strategy was up to the attorneys. *Id.*
19 Counsel believed that the witnesses and information they recieved would not be beneficial to the
20 case. *Id.* The court told petitioner that legal strategy was up to the attorney, and what strategy to use
21 was within counsel's discretion. *Id.* at T 23. The court stated that it could not allow petitioner to
22 change attorneys just because he did not agree with his lawyers' strategy. *Id.* at T 24. The court
23 denied petitioner's motion. *Id.* at T 27.

24 The state district court addressed this issue at the evidentiary hearing. Exhibit 46 at T 52.
25 Defense counsel told the court that she did tell the court before trial that either she was going to
26 represent the defendant or he was going to represent himself, but that he could not have it both ways.
27 *Id.* Counsel also testified she never stated that she did not want to be petitioner's counsel. *Id.* at 54.
28 Counsel did tell the petitioner at the time of the preliminary hearing that she might be having surgery

1 and might not be able to represent him during trial. *Id.* Counsel also noted that while the petitioner
2 moved to dismiss counsel twice, the state district court denied those motions, therefore she had to
3 stay on the case. *Id.*

4 The Nevada Supreme Court determined that this claim was without merit. Exhibit 49. The
5 court stated:

6 Eleventh, appellant claimed that counsel was ineffective for failing
7 to remove herself as counsel. Specifically, appellant claimed that counsel
8 was not interested in representing appellant as exhibited by counsel stating
9 that she would not be present for trial because of an intended medical leave.
10 Appellant failed to demonstrate that counsel's performance was deficient,
11 or that the outcome of the trial would have been different if he had different
12 counsel. Counsel stated that she was taking medical leave, however, that
someone from the public defender's team, who understood the case, would
substitute. Furthermore, counsel was present at the trial, as the medical
leave was postponed. Counsel testified at the evidentiary hearing that she
never said that she was not interested in representing appellant. Appellant
failed to demonstrate that counsel's performance was ineffective, and the
district court did not err in denying this claim.

13 *Id.*

14 The Nevada Supreme Court's determination is not objectively unreasonable. Petitioner must
15 show that trial counsel labored under an actual conflict, or that counsel was actively representing
16 conflicting interests and the conflict actually affected the adequacy of his representation. *Cuyler v.*
17 *Sullivan*, 446 U.S. 335, 350 (1980). Petitioner cannot show that counsel was representing conflicting
18 interests.

19 However, to compel a criminal defendant to undergo trial with an attorney "with whom he
20 has become embroiled in irreconcilable conflict is to deprive...[a criminal defendant] of the effective
21 assistance of counsel." *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (citing *Brown v.*
22 *Craven*, 424 F.2d 1166 (9th Cir. 1970)). In some cases the summary denial of a criminal defendant's
23 motion for new counsel, without further inquiry into the grounds of the motion, violates the Sixth
24 Amendment. *Id.* Essentially, a state trial court "has no discretion to ignore an indigent defendant's
25 timely motion to relieve an appointed attorney." *Id.* "However, not every conflict or disagreement
26 between...[a] defendant and counsel implicates Sixth Amendment rights." *Id.* at 1027 (citing *Morris*
27 *v. Slappy*, 481 U.S. 1, 13-14 (1983) (holding the Sixth Amendment does not guarantee a meaningful
28 relationship between a defendant and counsel)).

1 There is no indication that petitioner and defense counsel were embroiled in an irreconcilable
 2 conflict. The state court held a hearing on this issue prior to trial, and addressed the issue again at
 3 the evidentiary hearing. The state courts found that no irreconcilable conflict existed. The factual
 4 findings of the state courts are presumed correct. 28 U.S.C. § 2254(e)(1). The Nevada Supreme
 5 Court's determination is not an objectively unreasonable application of federal law.

6 The Court will deny ground seven.

7 **H. Ground Eight**

8 Petitioner's eighth ground for relief is a claim of cumulative error. The Court will address
 9 this claim at the end of this order, as the Court cannot determine whether there was cumulative error
 10 until every other claim in the petition is addressed first.

11 **I. Ground Nine**

12 In ground nine petitioner contends that he was denied his rights to effective assistance of
 13 appellate counsel due to appellate counsel's failure to (1) challenge his habitual felon enhancement
 14 on appeal, and (2) to raise prosecutorial misconduct that occurred at trial.

15 The Nevada Supreme Court affirmed the denial of this claim on appeal, stating the following:

16 Appellant claimed that his appellate counsel was ineffective for
 17 failing to raise errors in his adjudication as a habitual felon. Appellant
 18 failed to demonstrate that the omitted issue had a reasonable probability of
 success on appeal. As discussed above, appellant's adjudication as a
 habitual felon was proper. Thus, the district court did not err in denying
 this claim.

19 Exhibit 49.

20 Claims of ineffective assistance of appellate counsel are reviewed according to the standard
 21 announced in *Strickland*.” *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002). A petitioner must
 22 show that counsel unreasonably failed to discover nonfrivolous issues and there was a reasonable
 23 probability that but for counsel's failures, he would have prevailed on his appeal. *Smith v. Robbins*,
 24 528 U.S. 259, 285 (2000).

25 The Nevada Supreme Court's determination was not objectively unreasonable. This Court
 26 discussed petitioner's adjudication as a habitual felon in grounds one, two, and three. The Court
 27 concluded that the state's notice of intent to seek a habitual felon adjudication was proper.
 28 Moreover, it appears that the state provided the requisite prior convictions for the habitual felon

1 status, therefore petitioner's adjudication as a habitual felon was proper. Appellate counsel was not
2 ineffective for failing to raise this claim on direct appeal, and there is no reasonable probability that
3 this claim would have prevailed on appeal.

4 Petitioner also claims that appellate counsel failed to argue instances of prosecutorial
5 misconduct on appeal. However, petitioner does not provide any factual support for this claim, as he
6 does not list any of the alleged instances of prosecutorial misconduct. Conclusory allegations which
7 are not supported by a statement of specific facts do not warrant habeas relief." *James v. Borg*, 24
8 F.3d 20, 26 (9th Cir. 1994); *Boehme v. Maxwell*, 423 F.2d 1056, 1058 (9th Cir. 1970). Petitioner has
9 not shown that appellate counsel was ineffective for failing to argue on appeal that the prosecutor
10 engaged in misconduct, nor has he shown that there was a reasonable probability that this issue
11 would have prevailed on appeal.

12 The Court will deny ground nine.

13 **J. Ground Ten**

14 In his tenth ground for relief petitioner alleges that he was deprived of his rights to equal
15 protection, a fair trial, due process, and his right against self-incrimination when the trial court
16 denied his motion to suppress his statement. Petitioner argues that his statement to police was not
17 freely, voluntarily and knowingly given, in violation of his Fifth, Sixth, and Fourteenth Amendment
18 rights.

19 Petitioner raised this claim in his direct appeal. The Nevada Supreme Court summarily
20 concluded that this claim was without merit, stating:

21 Having reviewed Stanley's other arguments regarding the district court's
22 denial of his motion to suppress a statement he made to police and the
23 district court's practice of limiting counsel to only ask follow-up questions
during voir dire, we conclude they are without merit.

24 Exhibit 38 at 8, n. 18.

25 At the preliminary hearing officer Wilson testified that after the petitioner was arrested, he
26 read the petitioner *Miranda*² warnings from his memory. Exhibit 4, T 50-51. Petitioner was told
27 that he had a right to remain silent and the right to have an attorney represent him. *Id.* at T 51.

28 ² *Miranda v. Arizona*, 384 U.S. 436 (1996).

1 Wilson stated that the petitioner told him that he understood his rights, and decided to waive his
2 rights and speak to the officers. *Id.* The officer did not tape the waiver of rights, nor did he have the
3 petitioner sign a waiver of rights form. *Id.* at T 52. Officer Wilson also testified that the petitioner
4 was calm, awake, and did not appear disoriented. *Id.* at T 53. Wilson told the court that later during
5 the interview the petitioner appeared tired, but at the beginning of the interview he was very alert.
6 *Id.*

7 Detective Herring also testified at the preliminary hearing. *Id.* at T 56. When Herring spoke
8 with petitioner he knew that the petitioner had been read his *Miranda* rights by another officer. *Id.*
9 Herring did not re-read the petitioner his *Miranda* rights. *Id.* Herring tape recorded the interview
10 with the petitioner. *Id.* at T 57. Petitioner told the detective that he took a wallet from victim Billy
11 Barba. *Id.* Furthermore, petitioner admitted to pulling Barba out of his car and taking his vehicle.
12 *Id.* at T 57-58. Petitioner then told the officer that at the Budget Inn he punched the clerk in the eye,
13 physically struggled with the clerk, took money from the cash register and fled the hotel. *Id.* at T 58-
14 59. Petitioner also told the police officer that he attempted to take an elderly man's car, but the man
15 would not give it to him. *Id.*

16 Petitioner next told Detective Herring that the High Hat Motel was holding his clothing and
17 personal items, and he became upset. *Id.* at T 60. The petitioner sprayed gasoline on the woman
18 behind the counter, lit a match and set the woman on fire. *Id.* Herring testified that during the
19 interview the petitioner told him that he had been up "for awhile" and was tired. *Id.* at T 61. The
20 officer stated that petitioner told him he had been using drugs for four days. *Id.* at T 65. Herring had
21 encountered people that were under the influence of drugs prior to this case, and the petitioner did
22 not appear to be under the influence, he just appeared tired. *Id.*

23 After the preliminary hearing, defense counsel moved to suppress the petitioner's confession.
24 Exhibit 14. Defense counsel argued that there is no evidence that the police gave petitioner the
25 proper *Miranda* warnings, or that the petitioner freely and voluntarily waived those rights. *Id.* The
26 trial court denied the motion after hearing argument from counsel. Exhibit 17.

27 The written transcript of petitioner's post-arrest interview with police states the following:

28 Q: I hear ya. Okay. Uhm, I think that's about it. Do you remember when,

1 uh...when you first came in here you were talking to Officer Wilson –
2 around the corner over there?

3 A: Yeah. I --

4 Q: He, uh...he read ya your Miranda Rights, remember that?

5 A: Yeah. He --

6 Q: You remember him doin' that?

7 A: Yeah.

8 Q: You understood them, Right?

9 A: Yeah.

10 Attached at Exhibit 14.

11 At trial Officer Wilson testified that he gave the petitioner *Miranda* warnings after he
12 transported him to the jail. Exhibit 21, T 27. Officer Wilson stated that upon arrest and transport the
13 petitioner was not answering questions, but once they reached the jail, the petitioner initiated a
14 conversation with him. *Id.* Once petitioner told him his name, the officer read him his
15 *Miranda* rights. *Id.* at T 28. Officer Wilson recited the rights from memory. *Id.* Wilson told the
16 jury that he stated that the petitioner had the right to remain silent, that anything he said could be
17 used against him, that the had the right to an attorney prior to questioning, and this if he could not
18 afford an attorney, one would be appointed. *Id.* at T 29. The petitioner indicated that he understood
19 those rights. *Id.* The petitioner then told him that would speak with the police officers. *Id.*

20 The Nevada Supreme Court's summary rejection of this claim was not objectively
21 unreasonable. Petitioner was in custody, as he had been arrested, and therefore police were required
22 to give the petitioner *Miranda* warnings. *Thompson v. Keohane*, 516 U.S. 99, 101 (1995). Officer
23 Wilson testified at the preliminary hearing and at trial that he read petitioner his *Miranda* rights, and
24 that the petitioner waived those rights. Although a defendant's waiver of *Miranda* warnings must be
25 knowing, voluntary, and intelligent, a *Miranda* waiver does not have to be express, and can instead
26 be implied. *United States v. Younger*, 398 F.3d 1179, 1185-86 (9th Cir. 2005) (citations omitted).
27 Although there is no written record of petitioner's waiver, petitioner told Detective Herring, after his
28 interview, that he had been read his *Miranda* rights by Officer Wilson, and he understood those

1 rights. Moreover, he told the officers that he wanted to cooperate with them, and began to speak
2 with the officers. While the waiver may not have been express, there is no indication that the waiver
3 was involuntary or unknowing.

4 Petitioner also has not shown that any part of his statements, oral statements or taped, would
5 have been suppressed due to intoxication. “A confession is voluntary if it is ‘the product of a
6 rational intellect and a free will’” regardless of whether “‘a confession is the production of...a drug-
7 [alcohol-] induced state.’” *Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989) (citing
8 *Townsend v. Sain*, 372 U.S. 293 (1963)). The *Medeiros* court stated that the petitioner in that case
9 was unable to overcome the fact that his first statement to police was voluntary, because although the
10 petitioner was intoxicated, he was not incapacitated. *Id.* The court noted that the petitioner could
11 drive, obey officer orders and cooperate with the officers. *Id.*

12 In the instant case the petitioner told the officers that he had been under the influence of
13 drugs for four days prior to the commission of the crimes. Petitioner also told the officers that he
14 had not slept. Officer Wilson stated that when he first talked to petitioner he was calm, awake, and
15 oriented. Detective Herring testified that while the petitioner appeared tired, he did not appear under
16 the influence of drugs. Similar to *Medeiros*, petitioner has not shown that his statement should have
17 been suppressed due to his alleged intoxication.

18 Petitioner has not shown that the Nevada Supreme Court’s rejection of this claim was an
19 unreasonable application of United States Supreme Court precedent. The Court will deny ground
20 ten.

21 **K. Ground Eleven**

22 In ground eleven petitioner contends that his Fifth and Fourteenth Amendment rights to due
23 process were violated when the trial court incorrectly advised and instructed the jury about larceny
24 from a person.

25 The petitioner was charged in count II with larceny from the person, and the amended
26 information stated the petitioner “did then and there wilfully, unlawfully, and feloniously, under
27 circumstances not amounting robbery, with intent to steal or appropriate to his own use, take from
28 the person of another, to-wit: BILLY BARBA, without his consent, personal property, to-wit: wallet

1 and lawful money of the United States.” Exhibit 11. The trial court instructed the jury as follows
 2 on larceny from the person: “Every person who, under circumstances not amounting to robbery, with
 3 intent to steal or appropriate to his own use, takes from the person of another, without his consent,
 4 any money, property or thing of value is guilty of Larceny From the Person.” Exhibit 26.

5 During deliberations the jury sent the trial court a note asking if in order to find the petitioner
 6 guilty of larceny of a person they had to find that the petitioner took both money and a wallet from
 7 the victim. Exhibit 27, T 3. The judge told the jury that they did not have to find both in order to
 8 find the petitioner guilty of larceny from a person. *Id.* at T 3-5. Petitioner was convicted of larceny
 9 from a person. Exhibits 28 and 33.

10 Petitioner raised the instant claim in his direct appeal. The Nevada Supreme Court found the
 11 claim to be without merit. The court stated:

12 Stanley first argues the district court erred in responding to the jury
 13 question regarding larceny from the person. He contends the district court
 improperly rewrote the amended information.

14 In this case, while it is disputed whether Stanley took any money
 15 from Barba, Stanley clearly took Barba’s wallet. The district court’s
 16 response to the jury was a correct statement of law, i.e., the State only
 17 needed to prove beyond a reasonable doubt that Stanley took
 property—Barba’s wallet alone was sufficient. [fn 1: *See* NRS 205.270(1)
 and NRS 205.2195.] Based on the statute, we conclude the district court did
 not err in its response to the jury question.

18 Exhibit 38. The Nevada Supreme Court’s determination was not objectively unreasonable. The jury
 19 instruction was a correct statement of Nevada law. NRS 205.270(1); NRS 205.2195. The state only
 20 had to prove that the petitioner took property from the victim. Petitioner has not shown how this jury
 21 instruction violated his due process rights and resulted in an unfair trial.

22 The Court will deny ground twelve.

23 **L. Ground Twelve**

24 In ground twelve petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights to
 25 a fair trial and due process were violated when the trial court denied defense counsel’s request to ask
 26 the jury its pre-submitted voir dire questions.

27 Petitioner raised this claim in his direct appeal. The Nevada Supreme Court summarily
 28 concluded that this claim was without merit, stating:

1 Having reviewed Stanley's other arguments regarding the district court's
2 denial of his motion to suppress a statement he made to police and the
3 district court's practice of limiting counsel to only ask follow-up questions
during voir dire, we conclude they are without merit.

4 Exhibit 38 at 8, n. 18. The Nevada Supreme Court's determination that this claim was without merit
5 is not objectively unreasonable.

6 "Voir dire examination serves the dual purposes of enabling [a] court to select an impartial
7 jury and assisting counsel in exercising peremptory challenges." *Mu'Min v. Virginia*, 500 U.S. 415,
8 431 (1991). A trial court generally has broad discretion in conducting voir dire. *Id.* at 423. "The
9 Constitution...does not dictate a catechism for voir dire, but only that the defendant be afforded an
10 impartial jury." *Morgan v. Illinois*, 504 U.S. 719, 730 (1992) (citations omitted). A trial court's
11 failure to ask specific questions will only be overturned if the failure renders a defendant's trial
12 fundamentally unfair." *Id.* at n. 5.

13 Petitioner has not demonstrated how the trial court's refusal to use defense counsel's pre-
14 submitted voir dire questions rendered his trial unfair and resulted in an impartial jury. Defense
15 counsel was allowed to ask the potential jury members questions during voir dire, the court merely
16 disallowed the specific pre-submitted questions. Exhibits 18 and 19. There is no indication that the
17 Nevada Supreme Court unreasonably applied federal law. The trial court had broad discretion to
18 conduct voir dire, and petitioner does not state that the trial court failed to ask the venire panel any
19 questions. Instead petitioner contends that he was only permitted to ask follow-up questions that
20 relate to the questions asked by the trial judge. There is no indication that the trial court abused its
21 discretion in conducting voir dire in this case.

22 The Court will deny this claim.

23 **M. Ground Thirteen**

24 In ground thirteen petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights
25 to a fair trial by an impartial jury and due process were violated when the trial court allowed the state
26 to use a peremptory challenge to dismiss a black juror, which amounted to a *Batson* violation.

27 During voir dire potential juror Washington told the court that her brother was serving a
28 sentence for robbery. Exhibit 19, T 73. Washington explained that her brother escaped after five

1 years, was caught, and is serving a sentence as a result of the escape. *Id.* Washington indicated that
 2 she did not think it was fair that he was serving time, as he served his five years for robbery, and the
 3 state would not release him, so he escaped. *Id.* at T 73-76. Washington further stated that she
 4 understood the state may be the same office that put her brother in prison, but thought she could
 5 make a fair decision. *Id.* at T 76.

6 Washington also told the court that she worked as a legal secretary for seven years at a law
 7 firm in Las Vegas. *Id.* at T 77. Washington explained that the law firm she worked at handles civil
 8 cases, and she worked in the gaming and securities department. *Id.* The state exercised a
 9 peremptory challenge to remove prospective juror Washington. *Id.* at T 85.

10 Defense counsel objected to the removal of juror Washington, as she was African American,
 11 and asked for a race neutral reason. Exhibit 24. The state argued that the potential juror was a
 12 paralegal, and that sometimes people who know something about the law try to manipulate the
 13 process. *Id.* The state also named as a second reason the fact that the juror stated her brother was
 14 treated unfairly. *Id.* The state felt the juror could not be fair to the District Attorney's Office. *Id.*
 15 Finally, the state noted that there was an African American juror on the jury that the state did not
 16 exercise a peremptory challenge against. *Id.* The trial court found no *Batson* violation. *Id.*

17 The Nevada Supreme Court found the instant claim to be without merit. The court stated:

18 Next, Stanley argues the district court erred in denying his *Batson*
 19 *v. Kentucky* [fn 2: 476 U.S. 79 (1986).] challenge regarding the State's use
 of a peremptory challenge to dismiss a prospective black juror.

20 *Batson*, and its related progeny, set forth a three-step process for
 21 evaluating race-based objections to peremptory challenges: (1) the
 22 opponent of the peremptory challenge must make a prima facie showing of
 racial discrimination; (2) the burden of production then shifts to the
 23 proponent of the strike to come forward with a race-neutral explanation;
 and (3) if a race-neutral explanation is tendered, the trial court must decide
 24 whether the opponent of the strike has proved that the proffered race-
 neutral explanation is merely a pretext for purposeful racial discrimination.
 [fn 3: *Doyle v. State*, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996) (citing
 25 *Purkett v. Elem*, 514 U.S. 765, 767-69 (1995)); *Batson v. Kentucky*, 476
 U.S. 79, 91-99 (1986).]

26 In this case, Stanley has failed to offer any proof in support of his
 27 allegation that Washington was dismissed based on race. Thus, we
 28 conclude that Stanley failed to make a prima facie showing of racial
 discrimination. Even if Stanley had satisfied the first prong of *Batson*, the
 State's given reasons are race-neutral under *Purkett*, which requires only

1 reasons that are “facially neutral” and not necessarily “persuasive, or even
2 plausible.” [fn 4: *Purkett*, 514 U.S. at 768.] Accordingly, we conclude the
district court did not err in denying Stanley’s *Batson* challenge.

3 Exhibit 38.

4 “Peremptory challenges are not of constitutional dimension. They are a means to achieve the
5 end of an impartial jury.” *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *Poland v. Stewart*, 169 F.3d
6 573, 583 (9th Cir. 1999). The exception to this rule is when a peremptory challenge is used to
7 excuse a potential juror for discriminatory reasons, under the Equal Protection Clause. *Batson v.*
8 *Kentucky*, 476 U.S. 79, 89 (1986). *Batson* requires (1) a defendant raising a *Batson* claim to
9 establish a prima facie case of discrimination, (2) the state to show a race-neutral reason for the
10 peremptory strike, and (3) the trial court to determine whether the defendant has shown purposeful
11 discrimination. *Id.*

12 The state clearly gave proper race-neutral reasons for its peremptory strike of prospective
13 juror Washington. The defense did not show purposeful discrimination in this case. The Nevada
14 Supreme Court’s determination was not an objectively unreasonable application of *Batson*.

15 The Court will deny ground thirteen.

16 **N. Ground Fourteen**

17 In his fourteenth and final claim petitioner alleges his Fifth, Sixth, and Fourteenth
18 Amendment rights to due process and a fair trial by an impartial jury were violated when the state
19 district court dismissed a black juror who arrived in court fifteen minutes late.

20 Prospective juror Hymes was not present when the trial court swore the venire panel in and
21 began voir dire. Exhibit 18. When the juror arrived the trial court dismissed the juror. *Id.* The
22 defense challenged the potential juror’s removal, noting that Hymes was African American. Exhibit
23 24. The state argued that it dismissed the juror based upon the fact that the juror had missed opening
24 remarks of jury selection. *Id.*

25 The Nevada Supreme Court determined that this claim was without merit, and stated on
26 direct appeal:

27 Stanley also argues the district court erred in dismissing prospective juror
28 Hymes. Considering that Hymes arrived approximately fifteen minutes late
causing her to miss essential introductory information, including the

1 swearing in of the jury panel, we conclude the district court did not err in
2 dismissing her.

3 Exhibit 38.

4 The Nevada Supreme Court's finding that this claim was without merit is not objectively
5 unreasonable. Although prospective juror Hymes was African American, the state gave a race-
6 neutral reason for dismissing the juror pursuant to *Batson*. The petitioner has not shown that the
7 state or the district court engaged in purposeful discrimination when they dismissed prospective juror
8 Hymes.

9 The Court will deny ground fourteen.

10 **O. Cumulative Error**

11 Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated due to
12 trial counsel's cumulative errors.

13 The cumulative error doctrine recognizes that the cumulative effect of several errors may
14 prejudice a defendant to the extent that his conviction must be overturned. *See United States v.*
15 *Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996). The cumulative error doctrine, however, does *not*
16 permit the Court to consider the cumulative effect of *non-errors*. *See Fuller v. Roe*, 182 F.3d 699,
17 704 (9th Cir. 1999), *overruled on other grounds*, *Slack v. McDaniel*, 529 U.S. 473 (2000) ("where
18 there is no single constitutional error existing, nothing can accumulate to the level of a constitutional
19 violation").

20 The Nevada Supreme Court stated that petitioner failed to establish any errors by counsel or
21 that his case was prejudiced in any way by counsel's performance, therefore no cumulative error
22 existed. Exhibit 49. As the Nevada Supreme Court found, all of petitioner's claims are without
23 merit, therefore he has failed to demonstrate any cumulative error. This claim fails.

24 The Court will deny ground eight.

25 **IV. Certificate of Appealability**

26 In order to proceed with an appeal from this court, petitioner must receive a certificate of
27 appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make "a substantial showing of
28 the denial of a constitutional right" to warrant a certificate of appealability. *Id.* The Supreme Court

1 has held that a petitioner “must demonstrate that reasonable jurists would find the district court’s
2 assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484
3 (2000).

4 The Supreme Court further illuminated the standard for issuance of a certificate of
5 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

6 We do not require petitioner to prove, before the issuance of a COA, that
7 some jurists would grant the petition for habeas corpus. Indeed, a claim
8 can be debatable even though every jurist of reason might agree, after the
9 COA has been granted and the case has received full consideration, that
10 petitioner will not prevail. As we stated in *Slack*, “[w]here a district court
has rejected the constitutional claims on the merits, the showing required
to satisfy § 2253(c) is straightforward: The petitioner must demonstrate
that reasonable jurists would find the district court’s assessment of the
constitutional claims debatable or wrong.”

11 *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

12 The Court has considered the issues raised by petitioner, with respect to whether they satisfy
13 the standard for issuance of a certificate of appeal, and the Court determines that none meet that
14 standard. Accordingly, the Court will deny petitioner a certificate of appealability.

15 **IT IS THEREFORE ORDERED** that grounds one and three are **DISMISSED**. The Court
16 finds these grounds were procedurally defaulted in the state court.

17 **IT IS FURTHER ORDERED** that the petition for writ of habeas corpus (docket #10) is
18 **DENIED**.

19 **IT IS FURTHER ORDERED** that the clerk shall **ENTER JUDGMENT**
20 **ACCORDINGLY**.

21 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
22 **APPEALABILITY**.

23 Dated this 25th day of March, 2009.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE